The Rights of Neutrals & Belligerents,
on a modern point of view. By a Civilian.

1862.

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THE RIGHTS

OF

NEUTRALS AND BELLIGERENTS,

FROM

A MODERN POINT OF VIEW,

BY A CIVILIAN.

Tempora mutantur, et nos mutamur in illis.

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1862.

PREFACE.

THE latter portion of the present century has witnessed the growth of commerce to an extent surpassing the wildest dreams of the stormy years which ushered in its birth. Europe, then convulsed with conflict, required but repose and breathing time to develop those splendid truths of physical and abstract science, which held in their recognition the germ of the gigantic progress which has been made. The removal of each link of the chain with which commerce was, at the beginning of the century, so tightly bound, has been hailed as the producer of unmitigated good. But the triumph is not yet complete; the fetters are not yet altogether removed, and the measure of freedom already won requires that more should be done to realise its fullest development. To contribute to an end which involves so much the happiness of mankind is the duty of every one, and these pages are the writer's mite to the common fund. The study of what is actually passing around must convince us that theacceptance of manifest truths, is that real stream, fabled by the ancients, whose waters granted new life to those who were bold enough to plunge into them. Is it wise, therefore, to fear the invigorating plunge, to reject the truth for the privilege of becoming old? That we shall not long continue to fear the one and to reject the

other is beyond a doubt, but hesitation is the present difficulty, for which the remedy is simply honest boldness, a manly trust in truth, and a career of right.

The days of Vattel, Grotius, Puffendorf, and Bynkershoek are not our days; their doctrines, however applicable to those times, are unfit for these; they may have been suited for an era of war, they are unsuited to an epoch of peace. They advanced doctrines which, in their day, it was perhaps possible to maintain in some degree; but the conditions on which their views were framed have changed, and it would now be as easy to revive the dead creed of protection, as to rule the relations between neutrals and belligerents, by the antiquated laws of Oléron, the Costumbres Maritimas of Barcelona, or the once famed Consolato del Mare. It would be as easy to revert in medicine to the doctrines of Galen, and to accept the crude dogmas of Theophilus as the base of modern arts, as to define and govern our international relations by authorities, whose dicta have ceased to be in harmony with the feelings of the present time.

THE RIGHTS OF NEUTRALS AND BELLIGERENTS

FROM A MODERN POINT OF VIEW.

CHAPTER I.

INTRODUCTION.

THE plenipotentiaries of the Governments of Great Britain, Austria, France, Prussia, Russia, Sardinia, and Turkey concluded their labours at the Congress of Paris, in 1856, by signing the following Declaration respecting Maritime Law:—

"Considering:

"That Maritime Law in time of war has long been the subject of deplorable disputes:

"That the uncertainty of the law and of the duties in such a matter gives rise to differences of opinion between neutrals and belligerents, which may occasion serious difficulties and even conflicts:

"That it is, consequently, advantageous to establish a uniform doctrine on so important a point:

"That the Plenipotentiaries assembled in Congress at Paris cannot better respond to the intentions by which their Governments are animated, than by seeking to introduce into international relations fixed principles in this respect.

"The above-mentioned Plenipotentiaries being duly authorised, resolved to concert among themselves as to the means of attaining this object, and having

come to an agreement, have adopted the following solemn Declaration:—

"1. Privateering is and remains abolished;

"2. The neutral flag covers enemy's goods with the exception of contraband of war;

"3. Neutral goods, with the exception of contraband of war, are not liable to capture under enemy's flag;

"4. Blockades, in order to be binding, must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy."

The following States have since declared their unqualified adhesion to the principles which the Declaration maintained:—Baden, Bavaria, Belgium, Bremen, Brazils, Duchy of Brunswick, Chili, the Argentine Confederation, the Germanic Confederation, Denmark, the Two Sicilies, the Republic of the Equator, the Roman States, Greece, Guatemala, Hayti, Hamburgh, Hanover, the Two Hesses, Lübeck, Mecklenburg-Strelitz, Mecklenburg-Schwerin, Nassau; Oldenburg, Parma, Holland, Peru, Portugal, Saxony, Saxe-Altenburg, Saxe-Coburg-Gotha, Saxe-Meiningen, Saxe-Weimar, Sweden, Switzerland, Tuscany, Wurtemberg, Anhalt-Dessau, Modena, New Granada, and Uruguay.

Spain and Mexico, without agreeing to the abolition of privateering, accepted the remaining points of the declaration. The Government of the United States of America, however, regarding the declaration as too limited to confer upon commerce the whole of the privileges for which that Government contended, before granting its adherence to the proposals made by the

Emperor of the French, urged objections to its provisions on two specific grounds. These grounds, as stated by Mr. Marcy, in his despatch of the 28th of July, 1856, addressed to M. de Sartiges, the French Minister at Washington, were: 1st. That the amount of force required to constitute an effective blockade remained unsettled by the Declaration; and 2nd. That private property at sea should be equally respected during war as private territorial property. Mr. Marcy, however, stated that his Government was prepared to adopt the second, third, and fourth of the stipulations, in case the amendment proposed with regard to the first should not be assented to by the Powers which had acceded to the declaration. Subsequently, this amendment was submitted for adoption to all the Governments concerned. Generally, the proposition was not unfavourably received; but the principle yet remains to be consecrated by actual recognition.

At present, therefore, the Declaration drawn up at the Paris Congress, except the abolition of privateering, exists as the accepted basis of the International Maritime Code of the world. With that exception alone, it has been formally adopted by every country of Europe and America. Although the Government of the United States has not yet become a party to the general compact, that Government has long since, in special treaties with other countries admitted the principle of the second and fourth of its stipulations.*

Undoubtedly the doctrine promulgated by the

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* See Treaties with Sweden, 1827; Mexico, 1831; Chili, 1832; Peru, 1836.

Declaration of 1856, was an immense advance upon the constitution of international maritime law which had until then existed; and, amongst its highest and most beneficial results, the simplification which it introduced into the rules of maritime warfare, by the adoption of general principles common to all, must be regarded as of infinite importance.

The chief elements of the declaration were by no means unknown to nations in their treaties with each other. By the middle of the seventeenth century, Great Britain had already stipulated with various European powers for the liberty of neutrals, a right which was fully recognised by the Treaty of Utrecht in 1713, which declared "that everything found on board the vessels of both nations should, with the exception of contraband of war, be considered free,—a principle initiated by Great Britain in opposition to the Ordinance issued by Louis XIV. in 1681, which maintained the right of confiscating the vessels of neutrals carrying an enemy's goods, as well as the goods themselves. The principle of the Ordinance was, however, abandoned by France in the Treaty concluded between that Power and the United Provinces contemporaneously with the Treaty of Utrecht.

The growing maritime power of Great Britain led the government of this country, within less than half a century of the conclusion of that treaty, to abandon the principles which it had since that period rigorously maintained, and the French Revolution of 1793, and the events which immediately led this country into protracted war with France, witnessed the complete sacrifice of the rights with which neutrals had been invested, and which the maritime power of

England enabled her to disregard. Her desperate position, the belief that her existence as a power was dependent upon the success of her arms, the hatred and horror with which the country regarded the development of revolutionary power, were probably as powerful in their influence as the arrogance of naval supremacy, and the measures which were adopted were palliated as the necessary exigencies of the time. It was then, as it is now, an advantage to Great Britain that the rights of neutrals should be respected, and it can hardly be imagined that the passions of the country had so far acted as a blind to its interests, that the benefits of this privilege should have been entirely overlooked. Already the question had been widely discussed; and maritime nations had perceived how nearly its settlement concerned the interests of their commerce. "The spirit of the time" says M. Lucchesi Palli in a work* which more than any other appears to have treated the question in a comprehensive and enlightened manner, "seized upon this question of international public law, which attracted the attention of philosophic writers. All recognized that the liberty of commerce was based upon natural right. All recognized equally that the obstacles with which the commerce of neutrals was harassed in the middle ages were the effect of ignorance, of abuse, and of force."

From the beginning of the present century to the treaty of Vienna, the wars with which Europe was convulsed, left but little opportunity for any further solution of the question. The opportunity offered

* *Principes du Drait Public Maritime, trad par Galiani*, Paris, 1842.

however, for its more definite and precise settlement by the assembly of the congress of European powers, between whom that treaty was concluded, led to no further result than an arrangement that the various countries should contract mutual engagements by which the rights of each should be defined. But the promise was indifferently fulfilled, and no concerted action was adopted by the powers of Europe, until the termination of the war with Russia again afforded an opportunity at the Congress of Paris for determining the basis upon which the treatment of neutrals should be regulated.

The result of the deliberations of that assembly has been already recorded.

Briefly, but truly and impartially it is hoped, the various changes in the principles of the treatment which has been practised by belligerents in regard to neutrals, have now been noticed from the middle of the seventeenth century to the present time.

We will now pursue the question with reference to the positions which yet remain undetermined.

It will be observed, that the result of all action upon the subject has hitherto been the definitive *general* adoption of two points alone; namely the right of the neutral flag to cover the goods of the enemy; and the freedom of neutral goods on board the vessel of a belligerent, contraband of war in both cases being excepted.

Three propositions still remain for acceptance before the code of international maritime law can be regarded as complete. These propositions are:—

1. The exemption from seizure of private property at sea.

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2. The definition of contraband of war.

3. The constitution of an "effective blockade."

The foregoing points will now be considered in detail. First, as respects the light in which they have been hitherto regarded; and, second, as to the expediency of placing them on a base more in accordance with the spirit of modern institutions.

With the first proposition it is obvious that the question of privateering, which now happily exists only as a fading relic of former days, is still intimately associated. That Mexico and Spain should have hitherto declined to adopt this portion of the maritime declaration is hardly of importance, but so long as the government of the United States insists upon maintaining the preservation of the right, until private property at sea shall no longer be exposed to the hazards of war, the two questions cannot be separately treated.

In the present instance, it is hardly necessary after what has been already stated in these pages on the subject, to enter upon the views which had been entertained amongst nations in regard to privateering previously to the Congress of Paris. Although sanctioned by maritime usage, Great Britain and France wisely declined, on the breaking out of the Russian war, to avail themselves of a customary right which was repugnant to the humanity of civilized nations, and at discord with the principles of modern warfare.

It was not, however, the first occasion upon which the institution had been condemned, although in practice it was then for the first time abandoned.

"The practice," says Mr. Wheaton*, "of cruising with armed vessels commissioned by the state has been hitherto sanctioned by the laws of every maritime nation as a legitimate means of destroying the commerce of an enemy. This practice has been justly arraigned as liable to gross abuses, as tending to encourage a spirit of lawless depredation, and as being in glaring contradiction to the more mitigated modes of warfare practised by land. Powerful efforts have been made by humane and enlightened individuals to suppress it, as inconsistent with the spirit of the age. The treaty negotiated by Franklin between the United States and Prussia in 1785, by which it was stipulated, that, in case of war, neither power should commission privateers to depredate upon the commerce of the other, furnishes an example worthy of applause and imitation."

Upon the expiration of that treaty, however, the stipulation was not renewed; and the right to employ this kind of force existed down to the period of the treaty of Paris.

The United States of America, the only maritime power of importance which still refuses to abandon this mode of warfare so long as the seizure of private property at sea is regarded as an acknowledged right, palliates its position by the inferiority of its naval power, and the consequent danger to which adherence to the modern doctrine would expose their commerce, a danger which they allege would not be balanced by the mere non-employment of privateers by their enemy.

It is not intended to discuss here the question of

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* *Elements of International Law.* London, 1836. Vol. II., p. 87

on which side the advantage lies. We are told, that the right of privateering shall be yielded, on the condition of the exemption from seizure of private property at sea being accorded. It is our purpose to examine how far this tenet can be safely accepted, and what are the benefits its adoption would confer on the interests of commerce.

The maxim of ancient warfare was, that belligerents should mutually inflict upon each other the greatest injuries in their respective power, in order to terminate hostilities as speedily as possible. How far this maxim was carried out is familiar to every student of history, and even the romance of chivalry cannot blot from the mind the atrocities which characterised the spirit of the warfare of past ages. The bloody battle-field, the desolated homes, the ravaged cities, and the fiendish butchery, were themes of exultation and of triumph to the victors. To judge the actions of past ages by the standard of our own day, is not, however, a safe guide to correct opinion, but to adapt the false notions of barbarous times to the condition of the present must ever act as a drag-chain to human progress.

It is premised, that, whatever may be held to the contrary, there is a strict general analogy between territorial and maritime hostilities, and that the rules and principles which govern in the one case need not be necessarily discarded in the other.

Jurists have urged precedents, and have drawn distinctions between the two, usage has been quoted, and the right has been maintained of inflicting an injury on an enemy at sea, whilst on land that right was repudiated. But, in early periods, the ravages

of warfare were necessarily far more felt on land than at sea, and hence the earlier recognition of the rights of private property.

Referring to the long-admitted principle that prisoners are exempt from acts of hostility, Mr. Wheaton remarks that,* "the application of the same principle has also limited and restrained the operations of war against the territory and other property of the enemy. From the moment one state is at war with another, it has, on general principles, a right to seize on all the enemy's property, of whatsoever kind, and wheresoever found, and to appropriate the property thus taken to its own use or to that of the captors. By the ancient law of nations, even what were called *res sacræ* were not exempt from capture and confiscation. Cicero has conveyed this idea in his expressive metaphorical language, in the fourth Oration against Verres, where he says that 'Victory made all the *sacred* things of the Syracusans *profane*.' But by the modern usage of nations, which has now acquired the force of law, temples of religion, public edifices devoted to civil purposes only are exempted from the general operations of war. Private property on land is also exempt from confiscation, with the exception of such as may become booty in special cases, when taken from enemies in the field or in besieged towns, and of military contributions levied upon the inhabitants of the hostile territory. This exemption extends even to the case of an absolute and unqualified conquest of the enemy's country. In ancient times both the moveable and immoveable pro-

* *Elements of International Law*, p. 80.

perty of the vanquished passed to the conqueror. Such was the Roman law of war, often asserted with unrelenting severity, and such was the fate of the Roman provinces subdued by the northern barbarians on the decline and fall of the Western Empire."

The above is a picture which must be familiar to every reader of history. But the evil held within itself its remedy; and the very extent and horror of the usage forced into life that milder spirit which is still held as a sacred principle of territorial warfare.

The very cause which led to the abolition of the usage on land is being rapidly and surely developed with regard to maritime warfare. The wide diffusion of every branch of maritime commerce, and the enormous growth of navies, have in modern times incalculably enlarged the means of inflicting injuries at sea. We can hardly longer speak of the "silent highway of the ocean," which, brightened with countless sails, now teems with the life of commerce. The burden which on land was too sore for humanity to bear, has become so on the sea; and the causes which induced the happy change in the one instance will eventually prevail in removing the burden in the other.

Let us consider the arguments which are held in favour of maintaining the existing usage.

CHAPTER II.

THE claim that private property at sea should be exempt from capture during war, is intimately connected with and probably owes its origin, like all similar claims, to the enormous development of commerce, and the complicated and delicate nature of its relations, requiring for its existence greater forbearance on the part of belligerents. Commerce, in becoming the superior interest and the higher power, now demands that its claims shall take precedence of the so-called rights of war, and that the concessions which peace has hitherto made to the requirements of belligerents, shall be accorded to the promoters and not to the disturbers of human happiness and progress.

The claim is, as we have said, a modern one, owing its birth to modern views arising from modern necessities.

The thoughtful mind of Franklin, struck with the advantage such an exemption would confer, and convinced that every extension of the rights of neutrals was a further guarantee for the peace of the world, lost no time in endeavouring to secure for his country the benefit of the recognition of the doctrine by other States. Writing in 1780 to Mr. Robert Morris, afterwards United States' Minister to the French Court, he says:—"Russia, Sweden, Denmark, and Holland are raising a strong naval force to

establish the free navigation for neutral ships, and of all their cargoes, though belonging to Enemies, except contrabands, that is, military stores. I wish they would extend it still farther, and ordain that *unarmed trading ships*, as well as fishermen and farmers, should be respected as working for the common benefit of mankind, and never be interrupted in their operations, even by National Enemies ; but let those fight with one another whose trade it is, and who are armed and paid for the purpose;" and writing* two days later to Mr. Dumas, he observes: — "I even wish, for the sake of humanity, that the Law of Nations may be further improved by determining that, even in time of war, all those kinds of people who are employed in procuring subsistence for the species, or in exchanging the necessaries or conveniences of life which are for the common benefit of mankind, such as husbandmen on their lands, fishermen in their barques, and traders in unarmed vessels, shall be permitted to prosecute their several innocent and useful employments without interruption or molestation, and nothing taken from them, even when wanted by an Enemy, but on paying a fair price for the same." A few years later and these liberal views were incorporated in the text of the Treaty concluded between the United States and Prussia, in which it was stipulated, that in case war should arise between the two contracting parties : "all merchant and trading vessels employed in exchanging the products of different places and thereby rendering the necessaries, conveniences, and comforts of human life more easy to be obtained and

* Franklin's works by Sparks, Vol. viii.

more general, shall be allowed to pass free and unmolested"

In the then disturbed condition of the world it was hardly possible that the principle could be generally adopted, and upon the renewal of the Prussian Treaty the clause was not repeated. But such a doctrine once having assumed a substantive character, was not to vanish from the minds of men; and Bentham does not overlook the justice of the principle. He warmly advocates in his Constitutional Code, the application of the "*individual sparing*" principle, and argues that hostilities should be confined to the property of the Government of hostile States. "Confine," he says, "the capture to such things as are in the hands of the Government of the hostile State;" and he supports his views upon the base, that the "impression made on the Enemy's strength by a loss of property already in the hands of his Government is much greater than that made thereon by a loss to the same pecuniary amount of a mass in the hands of individuals. He concludes his argument by enunciating the admirable maxim, that "on the part of the enemy, the less the suffering is, the less violent is the exasperation, the less strenuous the disposition, the less strenuous the endeavours to retaliate."

How immeasurably superior and more congenial to the more humane mind of the present day, is this doctrine to the creed taught by those who have hitherto been regarded as the apostles of Maritime Law. "How often," says Saint-Pierre,* "does a great name serve as a rampart of error rather than

* Etudes de la Nature.

as a beacon of truth." We have in opposition the principle laid down by Vattel, and almost invariably accepted by the earlier jurists. "We have a right,"* Vattel declares, "to deprive our enemy of everything which may augment his strength and enable him to make war. This every one endeavours to accomplish in the manner most suitable to him. Whenever we have an opportunity, we seize on the enemy's property and convert it to our own use, and thus besides diminishing the enemy's power, we augment our own and obtain at least a partial indemnification or equivalent either for what constitutes the subject of the war, or for the expenses and losses incurred in its prosecution: in a word we do ourselves justice."

The principle here advocated is now, as regards private property, confined to Maritime warfare—on land the capture of public property alone is held lawful, and the seizure of private goods is appropriately denominated "pillage."

It is a maxim of civil law admitted in most civilized countries of the world, that a person is responsible for the injury which his actions may inflict on another. This principle is not altogether unknown in International Law, but it has only been exceptionally introduced and never fully recognized. There is something almost humorous in Vattel's defence of a strict treatment of neutrals, and in his view of the position in which their commerce is placed in regard to belligerents.

"They suffer,"† he says, "indeed, by a war in

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* Book III., c. ix.

† Book III., c. vii.

which they have no concern; *but they suffer accidentally;* I do not oppose their right, I only exert my own; and if our rights clash with and reciprocally injure each other, that circumstance is the effect of inevitable necessity. Such collisions daily happen in war. When in pursuance of my rights, I exhaust a country from which you derived your subsistence, when I besiege a city with which you carried on a profitable trade, I doubtless injure you. I subject you to losses and inconveniences, but it is without design of hurting you. *I only make use of my rights and consequently do you no injustice.*" However absurd this argument may appear, and however much it may have been softened in actual practice, it is unquestionably still the leading principle of maritime warfare. What right have belligerents to dictate these conditions to neutrals more than the latter are entitled to force the converse upon the former? The right to live at peace with mankind is surely not inferior to the right to make war upon an enemy; and it would be better if the world would recognise this truth as equally applicable to nations amongst themselves as to nations individually.

The existing system of maritime warfare is at variance with the soundest maxims of political economy; and the injury inflicted on a belligerent, by the capture of private property, is equalised by that inflicted upon the general commerce of the other belligerent. And this doctrine is the more applicable in cases where the latter is largely indebted to its foreign commercial relations. Great Britain, for example, during the late war with Russia, required, for the purpose of hostilities, considerable quantities

of materials, of which Russia had been a chief source of supply; whilst the result of the plan of warfare adopted was, to draw the supply from Russia through an intermediate channel, thus largely increasing the cost entailed upon this country for the necessaries of war. The demand being considerable, the producer's price was tolerably sustained; so that, in fact, the chief burden of the exclusive system fell upon the country which had enforced it with a diametrically contrary purpose. Had private property at sea been exempt from capture during that war, what material difference could it have made to the prospects of the Allies, or to those of their enemy? To state that the foreign commerce of Russia was greatly straitened during that war, especially towards its close, is an obvious truism; but that disadvantage could only be owing to the direct prevention of private trading in an insignificant degree, as other channels than water communication remained open, for trade to take. Supposing, on the contrary, that private property at sea had been respected, what great advantage could she have derived from it, with funds exhausted and credit crippled, by a gigantic and insupportable war expenditure?

Strict military and naval operations must always really be the arbiters of modern war; and, for the most successful results, it is requisite that both land and sea armaments should be as little embarrassed as possible by mere duties of police. Supposing Great Britain and the United States at war before the disruption of the Union, and that this country had crippled her opponents' commerce, would the *actual* amount of injury resulting have been more detrimental to America than

to ourselves? It must ever be remembered, that the commerce between two countries exists under a natural law, for the mutual benefit of both, and that the disadvantages under which one of the parties may labour, must, of necessity, re-act upon the other. But the employment, in warfare, of purely professional means, does not operate similarly, as in this latter case, the result mostly depends upon the most effective condition of the armaments, and this may, by a wise expenditure, be attained, in the one instance, whereas it may be failed to be realized in the other at any cost.

Again, supposing that, before the disruption of the Union, England had declared war, for any reason, against the United States, is it not likely and natural that the sympathies of other countries would have been enlisted on the side of our enemy, from whose commerce our act had shut them out? It is true that this right has been claimed as a just prerogative of war, but how far would the exercise of such a prerogative, in this instance, have been injurious to our cause? The exasperation which neutrals would naturally feel, if *totally* deprived of their commerce, could not fail to place Great Britain at a vast disadvantage; for, whilst in such an event British subjects would be prohibited from trading with the enemy, neutrals would, if not wholly excluded, be the agents through whose means the commerce with the enemy would be transacted. Thus, the object of destroying the enemy's commerce would not be realized, and Great Britain, whilst deprived of the profits of the carrying trade, would be paying dearer for the goods which she received through intermediate channels.

The alleged destruction of Charleston harbour, which has created so just a feeling of indignation throughout all civilized countries, has a material bearing upon the argument which contends for the entire respect of personal property. That act, if analyzed, can only be regarded as a terrible illustration of the immense evils which are inherent in the existing system. Let us examine it.

It is clear that the world at large is vitally interested in the maintenance intact of all instruments that can contribute to the development of its commerce, and clearly the preservation of the private shipping of a country is equally beneficial to the world at large. Now, to argue the right of destroying an enemy's private shipping in detail, is to contend for the justice of its destruction in gross, as the items represent merely the integral elements of the aggregate. Therefore, to justify the destruction of individual trading vessels, entails the justification of the destruction of an enemy's commerce at its very source. After all, at present, that is only a question of degree, which it is now contended should be a matter of fixed principle; and, to argue from the converse, the destruction of a given number of vessels might inflict a greater injury than the sinking of stone fleets in a harbour. In the case in question, it is, evidently, after all, if we investigate the motives of our indignation, the magnitude of the evil inflicted, rather than the principle, which revolts and shocks us.

This first proposition has been discussed at greater length, because it closely resembles, in its general principles, the remaining propositions with which we

have to deal. The same economical and moral objections may, as will be shewn, be urged in regard to blockade as in regard to maritime captures of private property; and the question of contraband of war is intimately associated with that of the freedom and channels of private trade.

In concluding our remarks upon this proposition, we venture to strengthen our position by embodying some remarks upon the subject by one of the ablest of modern French political economists. M. De Molinari, reviewing the progress of the customs of war,* and contrasting the superiority of modern views regarding territorial warfare, with those held in respect of maritime war, observes that—"The laws of maritime warfare have unfortunately made a less rapid advance, the property which belligerents are accustomed to respect and protect on land, are still subject to seizure and to destruction at sea. Whence arises this difference? It is because belligerents are not so immediately and so visibly interested in respecting at sea the private possessions of an enemy as on land. Consequently, it is to the initiative of neutrals, whose interests are affected by the measures of belligerents rather than to the initiative of belligerents themselves, that the progress hitherto realised in regard to maritime warfare is principally indebted."

* See *Journal des Economistes*, Nos. Août et Septembre, 1854.

CHAPTER III.

CONTRABAND OF WAR.

We proceed to the consideration of our second proposition.

The absolute definition of what constitutes contraband of war has, perhaps, more than any other question embarrassed the trade of neutrals in their relations with belligerents.

The discoveries of modern science, the application to warfare of materials which have hitherto specially belonged to the arts of peace, and the employment in those arts of the ingredients which had heretofore more specially constituted prime necessaries of war, is daily altering the construction of the term "contraband of war." In war, everything which hostile nations require, is more or less directly fitted to increase their powers of resistance or attack, therefore everything which, in the true meaning of the term, can augment the resources of a belligerent, becomes, to a certain extent, contraband of war. To-day it may be the boxwood which shall form the plug for the Minié rifle ball; to-morrow it may be the cotton thread, or the coloured cloth for the soldier's uniform; each may be equally essential in warfare, and the whole question is vague, undetermined, and subject to arbitrary decision. Two tons of butter may be confiscated as unlawful merchandise, whilst seventy

tons of coal are adjudged lawful goods;* to-day, cotton and nitric acid are amongst the important requisites of tranquil industry, to-morrow, science combines them into the most destructive elements of modern warfare, and they may be used indiscrimately for the one purpose or the other. Combined, they may furnish the surgeon with the means of mitigating the sufferings of the wounded, the photographer with the means of taking instantaneous plans of an enemy's position; the general may acquire from them his deadliest weapon: the discovery of the means of conferring on metals a slightly increased tenacity, is likely enough to change entirely the nature of the explosive matters now used in warfare. That discovery made, could cotton be placed under the ban, and neutral nations be excluded from its traffic? England proudly leads the van amongst the nations of the world in preaching and practising the truthful, Christian doctrine of free-trade; but how can that noble creed effect the ready conversion of nations, whose necessities may require that their industries, connected with the manufacture of the material of war, should be protected, to enable them to meet the emergencies of the exclusion which war may at any time entail. The great lesson which is taught by the doctrine of contraband of war is naturally, that a nation should learn to rely upon itself for that material which, it may at any moment be precluded from obtaining elsewhere.

It is useless here, to follow the infinity of views

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* Pratt, *Contraband of War*, the Young Andreas.

which have been held at various times as to the construction of the term "contraband of war," equally it is unnecessary to dwell upon the annoyances to which neutral trade has at all times been subject, in consequence of the impossibility strictly to define what really constitutes it. International law has been described as following the principles of the laws of nature. The position is falsely assumed; the latter are immutable and unvarying; the former as it stands is as fickle as human desires—a thing of exception and not of rule. Based upon ancient authorities, and upon antiquated notions, it is at once unworthy of the broad principles of modern science, and a disgrace to modern civilisation. We will not, therefore, quote the authorities of bygone ages to support the principles which are advocated for the present day. How would free-trade have fared, if such a method had been adopted? Let us honour the *doctrinaires* of old for what they did in their day, for the service *they* rendered to *their* generation, but do not let their opinions impede the progress of the present. Let us accept that which time has proved to be sterling in their doctrines, but reject that which has no real foundation.

Having thus far examined the subject, we propose, as a question for solution, *Is it any longer possible or necessary to deal with contraband of war as a subject for international legislation*?

If it can be shown, that it is no longer *possible* to regard it in this light, we prove consequently the inutility of further provision.

We shall, therefore, attempt to solve the first question.

The assumed fundamental principle of the established rules of warfare in regard to neutrals is, that their operations should in no wise affect the mutual position of belligerents, that they should preserve a strict and rigorous impartiality towards either. In the abstract, this principle is correct, for the neutral who assists a belligerent to the prejudice of a second neutral, commits an act of hostility towards the latter, as well as to the enemy of the power in whose favour he acts; strictly his neutrality no longer exists.

Practically, however, the cosmopolitan character of modern commerce has rendered so perfect a neutrality altogether impossible to observe.

Let us take the map of Europe, and examine how far it is possible to exclude contraband of war from reaching a belligerent whose ports are blockaded. Railways have recently so altered the ordinary routes of commerce, that it is no longer necessarily destroyed, or even seriously impeded, by the blockade of an enemy's ports. Close effectively even, the Baltic ports, and the commerce of the countries affected will find an outlet through Holland, Belgium, and France. Close the Ports of the latter, and the Baltic ports become the entrepôts of a trade which new channels have rendered it impossible to compress within given limits. Again, the blockade of the Mediterranean ports would drive trade through the northern routes, and effect a most insignificant result as an operation of war. The supplies would still reach this country, but she would pay more dearly for them, at a moment also when it would be most desirable that her resources should be, as far as possible, unimpaired. Let us see how far

the injury inflicted during the last war fell on Russian commerce, and how far on that of Great Britain.

In 1853, the number of British vessels engaged in the direct trade between this country and Russia was 2197, their tonnage being 718,526 tons. The Russian figures of the same trade in that year were, 681 vessels, their aggregate tonnage 147,326 tons. Now, taking the figures of the tonnage, the relative loss of trade to Great Britain and to Russia respectively, is represented by the proportion of 5 to 1. Yet the trade of Russia found a considerable outlet by means of the *neutral* countries on her land frontier. Prussia alone, for instance, which sent us, in 1853, £150 worth only of tallow, was enabled in 1855 to supply that article to the extent of £1,837,381, the bulk of which was undoubtedly Russian; and other Russian commodities reached this country in a corresponding degree. As regards the continent of Europe, the larger proportion of the commerce of Russia is carried on, even in times of peace, by means of inland transport. It is evident, therefore, how little possible it is, in the event of a war with continental states, to inflict a direct blow of any magnitude upon their commerce by means of naval operations: where, during war, any real injury is inflicted upon industry, the cause originates rather from internal than external pressure; nor can we, in the late war with Russia, ascribe any portion of the triumphs which materially affected the position of the enemy, to any other than hostilities which were directed immediately against the forces and strongholds of our antagonists.

It may be urged, that the existing hostilities

between the Northern and Southern States of America offer an example of the power of preventing the admission into a belligerent territory of the so-called contraband of war. Even admitting that this is the fact, it can only be regarded as an exception to the rule, which could not recur in the event of the separation of the states and the development of means of transport from neighbouring territories. But supposing (a not improbable event) that the States should hereafter form two separate governments, what means would an European country at war with either, possess, of really preventing the access of commerce to the belligerent through the territories of the state which maintained the condition of neutrality?

It is *impossible* for a belligerent to compel a third country to observe a *strict neutrality,* the term is a fiction, and the observance of the condition invariably openly broken, in despite of every desire and wish on the part of Government. Despatches are considered by almost all jurists as contraband of war. But every mail which now crosses the Atlantic must bear the despatches of the American minister at this Court to the Government of Washington. Is this a strict observance of neutrality? Is it even preventible? Apparently then, neutrality is only a condition to be observed to the extent to which it can be *forced* upon a state by a belligerent power. In effect, despite of all prohibitions, that is what it practically amounts to. Sulphur has always been regarded as constituting essentially an object of contraband of war, how the theory is maintained in practice the following figures will serve to show:—

Imports of Sulphur into the United Kingdom and France during the years 1851-2-3-4-5-6.

	United Kingdom. cwts.	France. kilos.
1851 . . .	675,040	22,125,081
1852 . . .	697,858	31,708,387
1853 . . .	848,659	31,612,237
1854 . . .	1,406,258	37,864,890
1855 . . .	873,005	33,836,185
1856 . . .	1,370,717	23,650,699

The three first years, it must be remembered, were years of peace, the remainder those of the Russian war. Upon what principle was the exportation of this article permitted by the government of the Two Sicilies?

The exportation was at first prohibited; but, shortly afterwards, the prohibition was removed. Its removal was thus explained by M. Carafa in a despatch addressed to the French Minister at Naples.

"Considering that if, on one side, sulphur has been classed by several states amongst articles contraband of war, it is at the same time necessary to many industries; the government of the king, reserving his right of sale within his own territories, has decided that all persons should be free to purchase sulphur within the kingdom of the Two Sicilies, and to transport it at their own risk and peril wheresoever they may desire." Here, then, is an illustration of the principle claimed by Hübner, by Schlegel, who are amongst the rare early defenders of the rights

of neutrals, that they should be permitted to carry on, during periods of war, the branches of industry which form at all times essential portions of their commerce.

It might easily happen, that the present rules of international maritime law might cause more injury to a neutral than to a belligerent. In case, for example, a war were to break out between France and the United States, the former with her present navy might possibly effectually blockade many of the most important ports through which Great Britain draws her supplies;—it would be obviously her policy to attempt it in order to weaken as far as possible the resources of her enemy. Now, as the commerce between Great Britain and America is infinitely more important than that between the latter country and France, it is evident that a blow might be inflicted which should cause greater injury to this country than to France herself, and the irritation consequent on such a result might not by any means impossibly lead to a war between the two countries.

During the wars of antiquity, according to Hübner,* "except the munitions of war, or provisions, destined for invested, blockaded, or besieged places, the belligerent states of antiquity rarely permitted obstacles to the commerce of neutral nations."

Further, in 1589, the Hanse Towns claimed the right of a free commerce with belligerents, and extended their demand to the privilege of supplying them even with arms. Selden,† commenting upon this demand, is

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* See WARD on *Contraband of War*, Note, p. 180.

† *Mare Clausum*.

of opinion that such a traffic should be permitted whenever it is the principal branch of industry of a nation which furnishes arms indiscriminately to all belligerent powers.

In modern times, new and fastly increasing channels of communication have, in Europe at least, effected for neutrals the advantages which it is alleged were accorded to them by ancient belligerent states; the difference is, that the one was permissive and liable to interruption, and that the other must become an effective death-blow to the rights which hostile nations now assume, in regard to those nations which are at peace.

That which renders a belligerent's power the most dangerous to its enemy, is not necessarily confined to the mere material of war. Possessing resources, it will obtain these despite of every law which human ingenuity has ever framed. It is a narrow and ignorant construction of the term "neutrality" which defines it as an abstinence on the part of a neutral from supplying a belligerent with contraband of war. It is not the want of this that ever materially affects the issues of hostilities; it is the want of resources which alone can produce any serious and lasting result. "One is easily convinced, moreover," says a writer* from whom we have before quoted, "in examining the history of past wars, that prohibitions of this nature have never been of any use. Nations have often sued for peace from want of resources to continue a war; never have they been known to submit to the demands of any enemy for want of munitions of war."

* M. De Molinari, *Journal des Economistes*, tome ii., 1854.

We leave the consideration of this point with a quotation from Mr. Marcy, in the despatch to M. de Sartiges before alluded to, and which is quite in accordance with our argument.

"Humanity and justice demand, that the calamities incident to war should be strictly limited to the belligerents themselves, and to those who voluntarily take part with them; but neutrals, abstaining in good faith from such complicity, ought to be left to pursue their ordinary trade with either belligerent, without respect to the articles entering into it."

CHAPTER IV.

THE CONSTITUTION OF AN EFFECTIVE BLOCKADE.

It is intended briefly to review the present position of this proposition, and to pass at once to the question of how far blockade is useful and profitable as an operation of modern warfare.

The right to blockade the ports of an enemy, seems to have been justified, since the earliest times that a belligerent possessed the means of employing such a force against his enemy. The extent, however, to which it was employed appears somewhat doubtful, and it is not easy to discover whether such means were employed against peaceful as well as against fortified ports. As, however, nearly all important ports of commerce were, in earlier times, also fortified positions of war, it is hardly necessary to discuss the point.

In the celebrated Berlin Decree of 1806, it was declared by Buonaparte that England had outraged the ordinary usages of war by attacking the harbours and ports of commerce. There appears, however, no reason to suppose that it was so, and the declaration seems to have been based upon the principles of territorial warfare.* Assuming, therefore, that the right had until then been unquestioned, it is only necessary

* See Art. 8, Decree, Nov. 21, 1806.

to state, that in recent wars it has been merely required, in the interest of neutrals, that the blockade should be absolutely effective.

As to what constitutes this condition, there appears, amongst European states at least, to be a sufficiently definite understanding. The United States Government has, however, not altogether accepted those views as wholly conclusive,* but the objection raised by that Government appears by no means important.

It is not requisite, under these circumstances, to dwell further upon this point; the question, therefore, which remains to be considered is, that of use and justifiability; in fact, to examine the principles maintained by the Berlin Decree above referred to.

We can treat this question the more briefly, as the principles maintained, in support of the two former propositions, are equally applicable to this. The same principles of humanity, the principles which are held sacred in territorial warfare, the same principles of political economy apply to this question as to the former ones.

In modern days, the commercial property of a port belongs frequently as much to the world at large or to the subjects of a foreign nation, as to the subjects of the power in which that port is situated, sometimes, even, the balance is in favour of the foreigner. The blockade of such a port in other than a military sense, may, therefore, and frequently would, serve to do the greater damage to the power which effected the blockade. This is the case at present, and must daily become more so, as the interests of commerce

* See Mr. Marcy's Despatch to M. De Sartiges.

are more extensively diffused. The injury, therefore, which we inflict by such means upon an enemy's resources may be disproportioned to those which are suffered in consequence by our own. This result has actually taken place, and did not fail to be brought to the attention of the British Parliament, during the recent war with Russia.*

M. De Molinari, whose admirable articles upon the progress in the customs of war have already been quoted, enters fully into this question, in the true spirit of an enlightened political economist, and describes it, after adducing official figures in support of his conclusion, as "a profitless operation of war," and adds, "Considered as a means of warfare, as a measure intended to diminish the resources of the enemy, the blockade of the Russian ports cannot have been of much service. Besides, if we examine the nature of the commerce which the blockade interrupted, and if we examine into whose hands it has fallen, we shall be convinced that the damage which resulted from its interruption, was much more likely to affect foreign interests than those of Russia"

To enter into further details upon this question, would be travelling over ground already traversed, repeating arguments already advanced. We, therefore conclude, by observing that it would be more in accordance with the principles which we advocate, that blockades, where necessary as operations of war, should be strictly confined to naval ports, whether usual or temporary, and to those commercial ports which are already invested or besieged by land.

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* See Debates in House of Commons, 29 June, 1854.

CHAPTER V.

CONCLUSION.

Appeals to the strongest of all human passions, self-interest, are those which are most likely to be attentively considered. That passion, in the aggregate, lies at the bottom of all progress in the career of nations; the ardent longing for something better than that which exists, the dissatisfaction with things as they are, constitute the vital life of all progressive civilization. Ignorance alone sneers openly at the desire, whilst it follows in secret its dictates. The free human mind cannot submit to a passive condition of things; it demands that the progress of ideas should be at least at the level of actual circumstances.

The highest and noblest object of a war is to secure a firm and lasting peace, and not to reap for its harvest the momentary flush of victorious triumph on one side and a bitter feeling of hatred and revenge upon the other, where exasperation is sustained by the long-continued presence of deep personal injuries, of diminished individual prosperity. Such injuries must, to a certain extent, ever be inseparable from war, but, looking to the return of peace, it is the duty, t is probably the wish, of every one that the miseries of conflict should be carried as little as possible from the scene and moment of actual combat. This is no modern theory; for in long-gone times, it found ex-

pression in the mouth of Cicero, *Bellum ita suscipiatur, ut nihil aliud nisi pax quæsita videatur,*" but the practice has been lamentably at variance with the doctrine.

Within the last ten years, our foreign trade has made a gigantic progress; and the advance continues in an increasing rather than a diminishing ratio. Every pound of that increase denotes a greater British interest at stake in foreign countries, and, *vice versâ*, a greater foreign interest at stake upon British soil; but the great preponderance still remains with the former, and, consequently, so long as it remains so, the issue of hostilities must be actually, if not relatively, more disadvantageous to British than to foreign interests; more especially in Europe, in the ports of which British trade is carried on, whilst the commerce of other European countries is largely maintained through their land frontiers.

To reduce warfare to the actual operations of the forces of one Government against those of another, does not necessarily weaken the natural power of one nation more than that of another. As we have endeavoured to show, the advantages gained by maritime hostilities directed against private property, are of doubtful value, and not worth the enduring irritations they provoke. The country which has the largest amount of private property at sea to protect, requires the largest naval force to guard it; and if this requirement be no longer necessary, the largest fleet will still maintain its relative superiority.

A strict neutrality may be as impartially maintained by concession as by refusal. Hitherto the principle has been to refuse all aid of any kind to either belligerent; but, obviously, this doctrine is

actually liable to continual infraction. Henceforward, then, neutrality, unable to adopt that principle, should act on the principle of impartial concession to both hostile States, and this is the only course worthy of the name of a principle.

The opposite view was maintained by Vattel; but, however it may have suited the notions of his day, it is no longer admissible. He argues: "I do not say *to give assistance equally*, but to *give no assistance*; for it would be absurd that a State should, at the same time, assist two enemies. And, besides, it would be impossible to do it with equality; the same things, the like number of troops, the like quantity of arms, of munitions, &c., furnished under different circumstances, are no longer equivalent succours."*

Now, in the first place, the question of absurdity is easily dealt with; for the greatest act of assistance which neutral nations can afford, at the same time, to belligerents, is to allow them to fight their own battles without interruption. In the second place, the equality of the assistance to which Vattel further alludes, manifests a narrow view of the nature of assistance. A thousand yards of cloth or canvas to one belligerent, may be the equivalent of a hundred tons of sulphur to its enemy, who more requires that material than the other. If perfect freedom existed, belligerents themselves would soon settle the question, by taking each what they most required. If Spain and Italy were at war, Great Britain, as a neutral, would be, on following Vattel's plan, furnishing a far larger amount of assistance to the former, by supply-

* See Vattel, *Rights of War as to Neutrals.*

ing it with a given quantity of sulphur, than it would lend to the latter by furnishing it with an equal amount of the same material.

"When," says Lucchesi Palli,* "neutral nations sell to all indiscriminately, Governments are freed from the embarrassment of continual reclamations, infractions are prevented, belligerents deprived of the power of complaint. At the same time, the field is left open to merchants to pursue their business, and peacefully to reap the profit which is ever an advantage to nations."

We urge again, finally, that the rights of neutrals are superior to the rights of belligerents, and should ever be demanded as the first consideration of the latter upon the occurrence of hostilities. In past times, war has been the chronic, peace the abnormal, condition of things. But the growth of the human mind has reversed this condition, and modern civilisation, esteeming peace at a higher value than war, requires that international legislation should be directed henceforward in favour of the former; the interests of trade are greater than those of war, which must eventually succumb to the necessities of the other.

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* *Principes du droit maritime,* trad. par Galiani, p. 174.

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